

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2009-051860-001 DT

11/04/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

H. Beal

Deputy

STATE OF ARIZONA

CATHERINE LEISCH

v.

WILLIAM JOHN BELISLE JR. (001)

SIMONE ANNE ATKINSON

HIGHLAND JUSTICE COURT

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2009–051860.

Defendant-Appellant William Belisle (Defendant) was convicted in the Highland Justice Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop his vehicle, and contends the State did not present sufficient evidence to support the verdicts. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On November 19, 2009, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and improper right turn, A.R.S. § 28–751(1). Prior to trial, Defendant filed a Motion To Suppress that alleged the officer did not have reasonable suspicion to stop his vehicle. At the hearing on Defendant’s motion to suppress, Officer Steven Gilbert testified he was in the left-turn lane facing north on Gilbert Road waiting to turn left onto Baseline Road when he first saw Defendant. (R.T. of July 20, 2010, at 7–8, 14.) Defendant was in the northernmost of two private drives for a shopping complex on the northwest corner of Baseline and Gilbert Roads. (*Id.* at 9–10.) Defendant turned right from of that driveway to go south on Gilbert Road, and turned into the number 1 or median lane of Gilbert Road. (*Id.* at 9–11.) At this point, Gilbert Road has three southbound through lanes. (*Id.* at 16.) As Defendant approached the intersection with Baseline Road, he moved into the number 2 left-turn lane. (*Id.* at 11.) Officer Gilbert testified the number 1 lane was not the lane into which Defendant was required to turn under Arizona law. (*Id.* at 13.)

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Officer Michael Prather testified he was with Officer Gilbert on that occasion, and he agreed with the testimony Officer Gilbert had given. (R.T. of July 20, 2010, at 24.) He issued the traffic citation to Defendant for a violation of A.R.S. § 28-751(1). (*Id.* at 24, 26)

The trial court took under advisement the issue whether Defendant's turn violated A.R.S. § 28-751(1). (R.T. of July 20, 2010, at 51.) The trial court subsequently determined Defendant had violated A.R.S. § 28-751(1), and denied Defendant's Motion To Suppress.

At trial, Officer Gilbert testified he was on duty on November 19, 2009, when he came into contact with Defendant. (R.T. of Dec. 10, 2010, at 7.) He said he and Officer Prather were on separate motorcycles in the left-turn lane facing north on Gilbert Road waiting to turn left onto Baseline Road. (*Id.* at 11.) Two things drew his attention to Defendant: (1) Defendant pulled out of the driveway across the number 3 and number 2 lanes, and into the number 1 lane; and (2) Defendant did not use a turn signal. (*Id.* at 12-13.) He said under his understanding of Arizona law, Defendant was required to make that right turn into the number 3 lane. (*Id.* at 13.) Defendant moved into the number 2 left-turn lane and turned left to go east on Baseline Road. (*Id.* at 14.) The officers followed Defendant on Baseline Road, and Officer Prather stopped Defendant's vehicle. (*Id.* at 14-15.) Officer Gilbert testified the wide turn and the turn without signaling were NHTSA nighttime driving cues indicating possible impairment. (*Id.* at 17.)

Officer Prather testified he was on duty on November 19, 2009, at 11:54 p.m. when he came into contact with Defendant. (R.T. of Dec. 10, 2010, at 40-41, 50.) Officer Gilbert said he saw a vehicle make a wide right turn without signaling, so they followed that vehicle and Officer Prather stopped it. (*Id.* at 44-45, 48.) When Defendant lowered his window, Officer Prather smelled alcohol and asked him how much he had to drink. (*Id.* at 49.) Defendant said "probably a couple of beers," and this was at the Tilted Kilt. (*Id.* at 49, 51.) Officer Prather also saw Defendant had bloodshot and watery eyes. (*Id.* at 49.) Based on these observations, Officer Prather asked Defendant to perform some field sobriety tests. (*Id.* at 50, 53.) He had Defendant perform the HGN test, and saw four out of six cues. (*Id.* at 54-55.) This indicated Defendant may have a BAC over 0.08. (*Id.* at 55, 57.) He had Defendant do the walk-and-turn test, during which he missed touching his heel to toe twice and had to use his arms for balance. (*Id.* at 57-61.) He had Defendant do the one-leg stand test, during which Defendant had a 1- to 2-inch sway. (*Id.* at 62-63.) He had Defendant do the Rhomberg modified tests, during which Defendant also had a 1- to 2-inch sway. (*Id.* at 63-64.) He had Defendant do the finger-to-nose test, during which Defendant had four or five misses out of six tries. (*Id.* at 64-65.) Officer Prather again asked Defendant how much he had to drink, and Defendant said four glasses of beer. (*Id.* at 68.) For intoxication, Defendant rated himself as 4 on a scale of 10 at the time of the stop. (*Id.* at 69.) Officer Prather arrested Defendant and had him transported to the Gilbert Police Station. (*Id.* at 70-71.)

At the police station, Officer Prather read Defendant the *Miranda* warnings and the Admin Per Se advisement. (R.T. of Dec. 10, 2010, at 71.) Defendant consented to the blood draw, which took place at 1:12 a.m. (R.T. of Dec. 10, 2010, at 72, 74.)

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Laura Mueller testified she was a criminalist with the Arizona Department of Public Safety and tested a blood sample identified as being from Defendant. (R.T. of Dec. 14, 2010, at 6, 9.) She explained the procedures she used to test Defendant's blood. (*Id.* at 11–21.) Exhibit 4 was the quality assurance report associated with her test of Defendant's blood, and Exhibit 5 was her report of her findings from her testing of Defendant's blood. (*Id.* at 11.) When the State offered Exhibit 5 in evidence, Defendant had no objection, so the trial court admitted that exhibit. (*Id.* at 21–22.) Ms. Mueller testified the results of her testing showed Defendant had a BAC of 0.1061 and 0.1062. (*Id.* at 22.) In her opinion, the testing results were very accurate. (*Id.* at 22–23.) In her opinion, alcohol would affect a person beginning at a 0.002 level, and that the driving ability for all people, regardless of drinking history or any physical characteristics, would be impaired at a level 0.08. (*Id.* at 23–28.)

After cross and redirect examination of Ms. Mueller, the State rested. (R.T. of Dec. 14, 2010, at 50.) Defendant moved for a judgment of acquittal, which the trial court denied. (*Id.*)

Defendant testified and gave his version of the events of that night. (R.T. of Dec. 14, 2010, at 51–76.) Mark Stoltman testified and gave his opinion why he thought the State's evidence and testing procedures were not valid. (*Id.* at 103–36.) The State then presented its rebuttal. (*Id.* at 175–86.)

On December 14, 2010, The jurors found Defendant guilty of both charges. Defendant later filed a Motion for Judgment of Acquittal After Verdict. At the sentencing, the trial court stated the Motion for Judgment of Acquittal After Verdict had been denied. (R.T. of Jan. 12, 2011, at 4.) Defendant's attorney then asked the trial court to reconsider its ruling. (*Id.*) After hearing Defendant's attorney's argument, the trial court stated, "I was surprised by the verdict, but I don't believe there is a basis for me to grant that motion and essentially overturn the judgment of the jury." (*Id.* at 7.) Defendant's attorney continued to argue why the trial court should grant the motion. (*Id.* at 7–10.) The trial court noted it had taken over 20 pages of notes and had review them all, and concluded Defendant had not met his burden that a judgment of acquittal should be granted, and so denied Defendant's motion for reconsideration. (*Id.* at 10–11.)

The trial court then proceeded with the sentencing. (R.T. of Jan. 12, 2011, at 11–18.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

- A. *Did the trial court abuse its discretion in finding the officer had reasonable suspicion to stop Defendant's vehicle.*

Defendant contends the trial court abused its discretion in finding the officer had reasonable suspicion to stop his vehicle. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de

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novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). A police officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect the person is involved in criminal activity or the commission of a traffic offense. *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985). The commission of a traffic violation provides sufficient grounds to stop a vehicle. *State v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996); *State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), quoting *United States v. Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990).

In the present case, Officer Gilbert testified Defendant made a turn from the driveway into the into the number 1 or median lane of Gilbert Road. (R.T. of July 20, 2010, at 9–11.) Defendant admitted he made this wide turn. (R.T. of Dec. 14, 2010, at 60.) Because this is a violation of A.R.S. § 28–751(1), the officers had reasonable suspicion to stop Defendant's vehicle.

Defendant contends, however, this is not a violation of A.R.S. § 28–751(1) because he made the turn out of a private driveway rather than from street to another. The Arizona Court of Appeals has already rejected this argument. *State v. Bouck*, 225 Ariz. 527, 241 P.3d 524, ¶¶ 6–16 (Ct. App. 2010). Defendant argument is therefore without merit.

B. *Did the State present sufficient evidence to support the verdicts.*

Defendant contends the State did not present sufficient evidence to support the verdicts. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jurors, but whether there is a complete absence of probative facts to support their conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). In the present case, the State presented evidence Defendant's BAC was 0.1061 and 0.1062. The criminalist testified all persons are impaired when over a 0.08 BAC. And the officer testified about signs of impairment that Defendant showed. The evidence was therefore sufficient to support the verdicts.

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Defendant challenges the written report from the State's criminalist, Laura Mueller. When the State offered that exhibit in evidence, however, Defendant made no objection. (R.T. of Dec. 14, 2010, at 21–22.) As far as the testing procedures, the rules of evidence provide as follows:

Rule 901. Requirement of Authentication or Identification.

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

....

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Rule 901, ARIZ. R. EVID. Ms. Mueller was a witness with knowledge who testified the testing process was what it was claimed to be. She offered testimony describing the process or system used to produce the result and showing the process or system produced an accurate result. The trial court therefore properly admitted, and the jurors properly considered, this evidence. To the extent the testimony from Defendant's witness contradicted the testimony of the State's witnesses, that went to the weight of the evidence and not its admissibility.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Suppress, and further concludes the State presented sufficient evidence to support the verdicts.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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